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8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT SEATTLE  
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12                  HAYTON FARMS INC., a Washington  
13                  Corporation, et al.,  
14

15                  Plaintiffs,  
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17                  v.  
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19                  PRO-FAC CORPORATION INC., a New  
20                  York corporation licensed to do business  
21                  in Washington,  
22

23                  Defendant.  
24

1                  CASE NO. C10-520-RSM  
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3                  ORDER GRANTING IN PART AND  
4                  DENYING IN PART DEFENDANT'S  
5                  MOTION TO DISMISS OR TO  
6                  MAKE MORE DEFINITE  
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8                   **I. INTRODUCTION**  
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10                  This matter comes before the Court upon Defendant's Motion to Dismiss Pursuant to  
11 FRCP 12(b)(6) or, In the Alternative, Make More Definite Pursuant to FRCP 12(e). Dkt. #36.  
12 For the reasons set forth below, the Court GRANTS in part and DENIES in part Defendant's  
13 motion.  
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## II. BACKGROUND

Plaintiffs are twenty-six (26) cucumber growers located in Washington and Oregon and are current or former members and shareholders of Defendant Pro-Fac. Defendant Pro-Fac Cooperative, Inc. (“Pro-Fac”) is a cooperative corporation formed in 1960 under the Cooperative Corporations Law of New York to market the agricultural products of its members. In this action, Plaintiffs bring claims for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, negligent performance of contracts, negligent misrepresentation, conversion, tortious interference, and breach of fiduciary duties. Dkt. #18.<sup>1</sup> At base, Plaintiffs contend that Pro-Fac was obligated to distribute its earnings proportionately and equitably and failed to do so. *Id.* at 2. However, the series of events giving rise to Plaintiff’s action began with the sale of a pickle business.

Pro-Fac's subsidiary owned a pickle business in Tacoma, Washington to which Plaintiffs had previously supplied cucumbers. When the business was sold to Dean Pickle and Specialty Products Company ("Dean") in June of 2000, Pro-Fac entered into a Raw Product Supply Agreement (the "Guaranteed Contract") with Dean. The Guaranteed Contract required Dean to purchase, and Pro-Fac to continue to supply, cucumbers for a period of ten years. Plaintiffs allege that they were third-party beneficiaries to the Guaranteed Contract and that they were promised that the contract would allow Plaintiffs to accumulate equity ("CMV credit") in Pro-Fac for a period of ten years. Dkt. #18, ¶¶ 3.27-32.

The Guaranteed Contract was renegotiated in 2005 to reduce the amount of crops required to be delivered under the Guaranteed Contract. Then, before the 2008 crop year, Pro-

<sup>1</sup> Originally, Plaintiffs sued Pro-Fac and the individual members of its Board of Directors. The individual defendants were dismissed by stipulation for lack of jurisdiction on August 2, 2010. (Dkt. #66).

1 Fac negotiated a termination of Guaranteed Contract. Bay Valley sought the cancellation of the  
 2 contract and the terms of that cancellation were allegedly negotiated with Pro-Fac without the  
 3 Plaintiffs' input. *Id.* at ¶¶ 3.70-72. In order to receive a share of the settlement from the  
 4 cancellation of the contract, Plaintiffs were asked to sign Release Agreements. The Release  
 5 Agreements purported to release Defendant from liability from any claims arising before the date  
 6 of the Release. Dkt. #36 Exs. 1-24. Plaintiffs understood that they were not releasing any share  
 7 of interest in Pro-Fac in the event of any eventual sale or liquidation of Pro-Fac or its subsidiary,  
 8 and in any case allege the Release Agreements were unconscionable. *Id.* at ¶¶ 3.77-79.

9       In approximately December of 2009 when Pro-Fac sold its Subsidiary, Plaintiffs learned  
 10 that they would not be receiving CMV credit for any years beyond the 2007 crop year. They  
 11 also learned that Pro-Fac had allegedly improperly given CMV credit to other members through  
 12 various contracts and arrangements, which had the result of diminishing Plaintiffs' pro rata  
 13 shares. *Id.* at ¶ 3.111.

14       Pro-Fac intends to liquidate at the end of 2012 and proceeds from the liquidation will be  
 15 distributed to current and former members of Pro-Fac based on CMV credit. Plaintiffs allege  
 16 that the proceeds from the liquidation are going to be distributed inequitably for a variety of  
 17 reasons including Pro-Fac's dealings with other members and Plaintiffs' loss of their post-2007  
 18 CMV shares. *Id.* at ¶¶ 3.114-124. Plaintiffs allege damages resulting from Pro-Fac's actions in  
 19 the form of diminished assets and lost profits.

20       This action was originally filed in Skagit County, Washington and was removed to this  
 21 Court on March 26, 2010. Dkt. #1. The instant Motion to Dismiss was filed by Defendant on  
 22 July 7, 2010, together with a Motion to Change Venue, in which Pro-Fac requested that this  
 23  
 24

1 action be transferred to the Western District of New York. Dkt. #s 35 & 36. On November 8,  
 2 2010, the Court denied Pro-Fac's Motion to Change Venue. Dkt. #73.

### 3 III. DISCUSSION

#### 4 A. Choice of Law

5 As an initial matter, the Court must decide what law to apply to Plaintiffs' tort and  
 6 contract claims. Pro-Fac asserts that New York law applies to all of Plaintiffs' claims, whereas  
 7 Plaintiffs argue that Washington law should apply. A federal district court sitting in diversity  
 8 applies "the forum state's choice of law rules to determine controlling substantive law." *Patton*  
 9 *v. Cox*, 276 F.3d 493, 495 (9th Cir.2002). Therefore, Washington choice of law rules apply.

10 In Washington, "there must be an actual conflict between the laws or interests of  
 11 Washington and the laws or interests of another state before Washington courts will engage in a  
 12 conflict of laws analysis." *Erwin v. Cotter Health Centers*, 161 Wash.2d 676, 692, 167 P.3d 1112  
 13 (2007) (citing *Seizer v. Sessions*, 132 Wash.2d 642, 648, 940 P.2d 261 (1997)). A real conflict  
 14 exists where the result of a particular issue is different under the laws of the two states. *Seizer*,  
 15 132 Wash.2d at 648. Where there is no conflict, presumptive local law is applied. *Id.* at 648-49.

#### 16 1. Negligent Performance of Contracts

17 Here the parties identify a conflict with respect to Plaintiffs' Sixth Cause of Action for  
 18 negligent performance of contracts. In New York, a cause of action for "negligent performance  
 19 of a contract" does not exist. *Fluhr v. Goldscheider*, 264 A.D.2d 570, 571, 695 N.Y.S.2d 30,  
 20 31 (N.Y. App. 1999)). In contrast, a tort by that name does exist under Washington law.  
 21 *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wash.2d 217, 230, 797 P.2d  
 22 477, 485 (Wash. 1990).

1       New York courts prohibit claimants from bringing a cause of action for negligence  
 2 arising out of a breach of contract. For example, in *Hamilton v. Hertz Corp.*, a plaintiff who had  
 3 sustained a car accident while in a rented vehicle alleged that she was entitled to relief as a third-  
 4 party beneficiary to a contract between Hertz and its licensee, from whom she had rented a  
 5 vehicle. 130 Misc.2d 1034, 1037 (1986). The contract required the licensee to offer minimum  
 6 insurance coverage to its drivers for free, but the licensee did not offer said insurance to plaintiff.  
 7 *Id.* The plaintiff sued for damages and the court dismissed plaintiff's complaint, fashioning  
 8 plaintiff's claim as an action for negligent performance of a contract, "which simply does not  
 9 exist at law." *Id.* In doing so, it explained, "Even if a breach is willful, where no public right is  
 10 involved the law imposes no further penalty than if the breach is merely inadvertent." *Id.*  
 11 (internal citations omitted). Similarly, in *Megaris Furs, Inc. v. Gimbel Bros., Inc.*, a New York  
 12 appeals court upheld the dismissal of plaintiffs' cause of action for negligent performance of a  
 13 contract where plaintiffs attempted to fashion their breach of contract claim as a claim for  
 14 negligent performance of that same contract. 172 A.D.2d 209, 211 (1991).

15       Plaintiffs' claim in the instant action is distinguishable from the claims at issue in  
 16 *Hamilton* and *Megaris*. Plaintiffs here are not asserting a public right arising out of a breach of a  
 17 private contract between Defendant and another party. Nor are they alleging that Defendant  
 18 acted negligently in breaching their contracts with the Plaintiffs. Their claim does not involve a  
 19 *breach* of contract at all. Rather, Plaintiffs allege that the mere fact of Defendant *entering* into  
 20 contracts with third parties constituted a breach of Defendant's (purportedly, extra-contractual)  
 21 duties to the Plaintiffs. *See Dkt. #18 ¶9.2* ("Defendant[] entered into contracts with parties other  
 22 than the Plaintiffs. The Defendant[] negligently performed those contracts and thereby breached  
 23 their duties to the Plaintiffs."). In essence, Plaintiffs allegations are that Defendant acted  
 24

1 negligently – because it owed duties to plaintiffs and breached those duties when it *entered* into  
 2 contracts with other parties.

3 The Court must construe Plaintiffs' pleading so as to do justice. Fed. R. Civ. P. 8(e).

4 Although Plaintiffs call their Sixth Cause of Action "Negligent Performance of Contracts,"  
 5 Plaintiffs' claim is actually a claim for negligence, which is not prohibited under New York law  
 6 under these circumstances. The standard for bringing negligence claims against a party with  
 7 whom a plaintiff has contractual relations is the same under both Washington and New York  
 8 law. In both states, a plaintiff can bring a tort claim for conduct arising out of a contractual  
 9 relationship if it alleges that the defendant owed the plaintiff a duty independent of the contract.

10 *See Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp.*, 725 F.Supp. 656,  
 11 662 (N.D.N.Y.,1989); *American Nursery Prods.*, 115 Wash.2d at 230. The fact that Plaintiffs  
 12 inaptly named their sixth cause of action "Negligent Performance of Contracts" is inapposite.  
 13 Since there is no genuine conflict of law between New York and Washington respecting  
 14 Plaintiffs' negligence claim, the presumptive local law – in this case Washington law – will be  
 15 applied to plaintiffs' sixth cause of action. *See Seizer*, 132 Wash.2d at 648.

16     2. Statutes of Limitations

17         The parties also identify discrepancies between the two states' statutes of limitations.  
 18 However, Washington has adopted the Uniform Conflict of Laws-Limitations Act (UCCLA),  
 19 which provides that a court must first determine which substantive law applies before  
 20 considering which state's statute of limitations applies. *See RCW 4.18.020; Rice v. Dow*  
 21 *Chemical Co.*, 124 Wash.2d 205, 210, 875 P.2d 1213, 1216 (Wash. 1994). Therefore, any  
 22 differences between New York and Washington statutes of limitation cannot give rise to a  
 23 conflict of laws analysis under Washington law.

1 Since the parties have not identified any true conflict of laws, the Court applies to all of  
 2 Plaintiffs' claims the presumptive local law, which in this case is Washington law.

3 **B. Standard**

4     1. 12(b)(6) Motion to Dismiss

5         In considering a Rule 12(b)(6) motion to dismiss, the Court must determine whether the  
 6 plaintiff has alleged sufficient facts to state a claim for relief which is "plausible on its face."  
 7 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550  
 8 U.S. 544, 570 (2007)). A claim is facially plausible if the plaintiff has pled "factual content that  
 9 allows the court to draw the reasonable inference that the defendant is liable for the misconduct  
 10 alleged." *Id.* (citing *Twombly*, 550 U.S. 556). In making this assessment, the Court accepts all  
 11 facts alleged in the complaint as true, and makes all inferences in the light most favorable to the  
 12 non-moving party. *Baker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009)  
 13 (internal citations omitted). The Court is not, however, bound to accept the plaintiff's legal  
 14 conclusions. *Iqbal*, 129 S. Ct. at 1949-50. While detailed factual allegations are not necessary,  
 15 the plaintiff must provide more than "labels and conclusions" or a "formulaic recitation of the  
 16 elements of a cause of action." *Twombly*, 550 U.S. at 555.

17     2. 12(e) Motion for a More Definite Statement

18         A party may move for a more definite statement if the pleading is so vague or ambiguous  
 19 that the party cannot reasonably prepare a response. Fed.R.Civ.P. 12(e). Such a motion is  
 20 appropriate where Plaintiffs have failed to give notice to the defending party of the substance of  
 21 the claim against them. *Sneller v. City of Bainbridge Island*, 2007 WL 4562882, 2 (W.D.Wash.  
 22 2007); *Beery v. Hitachi Home Electronics (America), Inc.*, 157 F.R.D. 477, 480 (C.D. Cal.  
 23 1993). However, courts generally disfavor motions for a more definite statement, and granting a  
 24 Rule 12(e) motion is "ordinarily restricted to situations where a pleading suffers from

1 unintelligibility rather than want of detail.” *Castillo v. Norton*, 219 F.R.D. 155, 163 (D.Ariz.  
2 2003). “[I]f the requirements of the general rule as to pleadings are satisfied and the opposing  
3 party is fairly notified of the nature of the claim,” a motion for more definite statement should  
4 not be granted. *Id.*; *Sheffield v. Orius Corp.*, 211 F.R.D. 411, 414-15 (D.Or.2002); *Tilley v.*  
5 *Allstate Ins. Co.*, 40 F.Supp.2d 809, 814 (S.D.W.Va. 1999); *see also Resolution Trust Corp. v.*  
6 *Gershman*, 829 F.Supp. 1095, 1103 (E.D.Mo. 1993) (“Rule 12(e) provides a remedy for  
7 unintelligible pleadings; it is not intended to correct a claimed lack of detail.”). Finally, “[i]f the  
8 moving party could obtain the missing detail through discovery, the motion should be denied.”  
9 *Davison v. Santa Barbara High School District*, 48 F.Supp.2d 1225, 1228 (C.D.Cal.1998);  
10 *Castillo*, 219 F.R.D. at 163 (“Rule 12(e) motions are “not to be used to assist in getting facts in  
11 preparation for trial as such; other rules relating to discovery, interrogatories and the like exist  
12 for such purposes.”).

13 | C. Analysis

14 || 1. The Releases

15 Defendants seek to dismiss several of Plaintiffs' claims on the basis of Release  
16 Agreements entered into by the majority of the Plaintiffs on April 2, 2008. The agreements  
17 allegedly release Pro-Fac from liability before that date.<sup>2</sup> Plaintiffs argue that (1) the Release  
18 Agreements were entered into without consideration, (2) they were signed under protest, and (3)  
19 they are unconscionable. Dkt. # 18, ¶¶ 3.76-77. Plaintiffs also allege that, even if the  
20 agreements are enforceable, their claims fall within exceptions included in the Releases,

<sup>2</sup> The Court may properly consider the release agreements without transforming the Motion to Dismiss into a Motion for Summary Judgment because the releases are undisputedly authentic, are central to Plaintiffs' claims, and are referenced in Plaintiffs' complaint. *See Janda v. T-Mobile USA, Inc.*, 2010 U.S. App. LEXIS 9515 at \*2 (9<sup>th</sup> Cir. May 5, 2010) ("[O]n a motion to dismiss, the district court may consider documents that are referenced by the complaint, are central to the plaintiff's claims, and the authenticity of which is undisputed." ).

1 including the exception for claims to Plaintiffs' share of Pro-Fac's gain from the sale of its  
 2 subsidiary. *Id.* at ¶ 3.78.

3 First, Plaintiffs have failed to allege that the Release Agreements were entered into  
 4 without consideration because Plaintiffs admit to receiving consideration for signing the releases.  
 5 *Id.* at 3.75 ("...Plaintiffs needed to sign putative settlement agreements in order to receive any  
 6 money at all."). Further, the contracts provide that, "In consideration of the payment under  
 7 Section 1 as set forth on Exhibit A, the Member hereby releases Pro-Fac..." Dkt. #36, Exs. 1-23.  
 8 Plaintiffs do not allege that they did not receive the consideration referenced to in the Release  
 9 Agreements themselves. Therefore, the Releases are not invalid for want of consideration.

10 Second, the fact that Plaintiffs claim to have signed the releases under protest does not  
 11 invalidate the releases. *See* 1-3 *Corbin on Contracts* § 3.30 (5th ed. 2003) ("An expression of  
 12 acceptance is not prevented from being exact and unconditional by the fact that it is  
 13 'grumbling[.]'"). *See also Ohmer v. Mel Farr Ford, Inc.*, 2001 Ohio App. LEXIS 3551 (Ohio  
 14 Ct. App. Aug. 13, 2001) (holding that plaintiff's signature on release with the words "under  
 15 protest" constituted a valid acceptance of defendant's counteroffer).

16 However, the Court is satisfied that Plaintiffs have pled sufficient facts to make a  
 17 plausible claim that the release agreements were unconscionable. Washington recognizes two  
 18 versions of unconscionability: substantive and procedural. *Adler v. Fred Lind Manor*, 153  
 19 Wash.2d 331, 344, 103 P.3d 773, 781 - 782 (Wash. 2004). Substantive unconscionability exists  
 20 where the contract is one-sided or overly harsh. *Id.* "'Shocking to the conscience',  
 21 'monstrously harsh', and 'exceedingly calloused' are terms sometimes used to define substantive  
 22 unconscionability." *Id.* at 344-45 (internal citations omitted). Procedural unconscionability is  
 23 "the lack of a meaningful choice, considering all the circumstances surrounding the transaction

1 including the manner in which the contract was entered, whether the party had a reasonable  
 2 opportunity to understand the terms of the contract, and whether the important terms were hidden  
 3 in a maze of fine print.” *Id.* at 345 (internal citations omitted).

4 Plaintiffs allege that the releases were unconscionable because Pro-Fac “simply informed  
 5 ... the Plaintiffs [that they] needed to sign putative settlement agreements in order to receive any  
 6 money at all” and that Pro-Fac failed to “allow the Plaintiffs to participate in the process [of  
 7 negotiating with Bay Valley]” or to “advise the Plaintiffs of the impact of the settlement.” Dkt.  
 8 #18, ¶¶ 3.75, 3.77. Further, Plaintiffs allege to have learned about the cancellation of the Bay  
 9 Valley contract, which they were relying on to provide a market for their cucumbers for the next  
 10 two years, at approximately the same time that they learned of the “need” to sign the release to  
 11 recover any damages from the cancellation. Dkt. #18. These facts would likely not support  
 12 holding a contract unconscionable as between sophisticated parties. However, making all  
 13 reasonable inferences in favor of the plaintiffs, and taking into account the unique relationship  
 14 between the parties, Plaintiffs may have lacked “a meaningful choice, considering all the  
 15 circumstances surrounding the transaction.” *Adler*, 153 Wash.2d at 345. Accordingly, the Court  
 16 declines to dismiss any of Plaintiffs’ claims at this stage of the litigation based on the Release  
 17 Agreements.<sup>3</sup>

## 18 2. Breach of Contract – Articles of Incorporation and Bylaws

19 Defendant seeks to dismiss Plaintiffs’ claim for breach of Pro-Fac’s Articles of  
 20 Incorporation and Bylaws for failure to state a claim or, in the alternative, requests that  
 21 Plaintiffs’ be ordered to make their claim more definite and certain. “Generally, a plaintiff in a  
 22 contract action must prove a valid contract between the parties, breach, and resulting damage.”

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23 <sup>3</sup> Because it is unnecessary, the Court declines to rule on the effect of the exceptions to the  
 24 Release Agreements.

1    *Lehrer v. State*, 101 Wash.App. 509, 516, 5 P.3d 722, 727 (2000). A corporation's governing  
2 documents comprise a contract that governs the rights of the parties. *In re Olympic Nat.*  
3 *Agencies, Inc.*, 74 Wash.2d 1, 4, 442 P.2d 246, 248 (Wash. 1968). Defendant argues that  
4 Plaintiffs have failed to allege duties imposed under this contract and have also failed to allege  
5 breach of those duties. Dkt. #36 p. 13.

6 Plaintiffs' complaint contains allegations of at least the following duties owed by Pro-Fac  
7 under the Bylaws and Articles of Incorporation:

- A duty to distribute its earnings “proportionately and equitably.” Dkt. #18 p. 2 (citing Section 7(c) of Pro-Fac’s Articles of Incorporation).
  - A duty to distribute its share of proceeds from the Event to “current and former members … in proportion to their respective aggregate patronage deliveries of crops to [Pro-Fac] during the period commencing on June 30, 2002 and ending on the date of the Event, as determined by the Board of Directors.” *Dkt. #18 ¶ 3.37* (citing Article X, Section 4 of Pro-Fac’s Bylaws).
  - A duty to buy back Plaintiffs’ common stock upon the negotiation of a permanent reduction in Plaintiffs’ deliveries. Dkt. #18 ¶ 3.45.

17 Plaintiffs complaint further alleges that Pro-Fac breached these duties by not treating members  
18 equitably in myriad ways, not distributing its share of proceeds from the Event as required under  
19 the Bylaws, allowing some members to accumulate CMV credit after the Event had occurred in  
20 violation of the Bylaws, and not buying back all of Plaintiffs' common stock upon the  
21 termination of the Guaranteed Contract.

Defendant argues that its actions with respect to the distribution of proceeds from the Event are consistent with Article X, Section 4 of the Bylaws. Therefore, Pro-Fac contends that

1 Plaintiffs' complaint should be dismissed because Plaintiffs' complaint demonstrates that  
 2 "Defendants did not breach the only section of the Bylaws they pled." Dkt. #36 p. 14. However,  
 3 "aggregate patronage deliveries" is not defined in the governing documents and the Court cannot  
 4 ascertain a plain meaning upon the information now before it. The Court is satisfied that  
 5 Plaintiffs have pled "factual content that allows the court to draw the reasonable inference that  
 6 the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1951. Accordingly, the  
 7 Court DENIES Defendant's Motion to Dismiss with respect to Plaintiff's First Cause of Action  
 8 for Breach of Contract.

9 To the extent that Plaintiffs have not cited specific provisions of the Bylaws and Articles  
 10 of Incorporation that were breached by Defendants, the Court does not find that such a failure  
 11 warrants a Court order that the Plaintiffs make their pleadings more definite. *See Castillo* 219  
 12 F.R.D. at 163. (holding that 12(e) motions are "ordinarily restricted to situations where a  
 13 pleading suffers from unintelligibility rather than want of detail.") The Court is content that  
 14 Defendant has been notified as to the nature of the claim asserted against it. *Id.* Therefore, it  
 15 DENIES Defendant's Motion for a More Definite Statement with respect to Plaintiff's First  
 16 Cause of Action for Breach of Contract.

17 3. Breach of Contract – Guaranteed Contract

18 "A plaintiff in an action for breach of contract must prove a valid contract exists between  
 19 the parties." *See Lehrer*, 101 Wash. App. at 516. Plaintiffs have failed to state a claim for relief  
 20 for breach of the Guaranteed Contract because they have failed to allege that the Guaranteed  
 21 Contracts are valid contracts between Plaintiffs and the Defendant. First, Plaintiffs are not  
 22 signatories to the Guaranteed Contract, signed in 2000, nor are they signatories to the  
 23 amendment of the Guaranteed Contract, signed in 2005. *See* Dkt. #18 ¶ 3.26; Dkt. # 36, Exs. 24

1    & 25. Second, Plaintiffs cannot support their allegations that they are third party beneficiaries to  
 2 the Guaranteed Contract.

3                 The creation of a third party beneficiary to a contract requires that a promissory *intend* to  
 4 confer a direct benefit to the third party beneficiary at the time it enters into the contract.

5 *Lonsdale v. Chesterfield*, 99 Wash.2d 353, 361, 662 P.2d 385, 389 - 390 (Wash. 1983). The  
 6 “intent” necessary to establish a third party beneficiary is “not a desire or purpose to confer a  
 7 particular benefit upon” the third party. *Id.* at 361. Rather, a court must look to the terms of the  
 8 contract to establish whether performance under the contract would *necessarily* and directly  
 9 benefit the purported beneficiary. *Id.* at 362.

10          Plaintiffs allege that “Pro-Fac represented to the Plaintiffs that it entered into the  
 11 guaranteed contract for [their] specific benefit ...” Dkt. #18 ¶ 3.27. This allegation, however,  
 12 refers to a “desire or purpose” to confer a benefit on Plaintiffs. It does not point to language in  
 13 the contract that would render a conferral of benefits on the Plaintiffs *necessary* in order to  
 14 perform the contract. *See Burke & Thomas, Inc. v. Intl. Org. of Masters*, 92 Wash.2d 762, 767-  
 15 768, 600 P.2d 1282, 1286 (Wash., 1979) (upholding dismissal of complaint for breach of duty to  
 16 purported third party beneficiaries to a union contract because “[p]etitioners point to no language  
 17 in the contract” indicating an intent to create such a duty).

18          Plaintiffs also allege that “under the intent of the parties and according to the  
 19 representations made by the Pro-Fac and its Board, the Plaintiffs were third-party beneficiaries of  
 20 the guaranteed contract.” Dkt. #18 ¶ 3.29. This is a legal conclusion that the Court is not bound  
 21 to accept. *Iqbal*, 129 S. Ct. at 1949-50. To survive a motion to dismiss, a plaintiff must provide  
 22 more than “labels and conclusions” or a “formulaic recitation of the elements of a cause of  
 23 action.” *Twombly*, 550 U.S. at 555. Since Plaintiffs cannot show that they were parties to the  
 24

1      Guaranteed Contract, Plaintiffs' claim for breach of the Guaranteed Contract fails. Accordingly,  
 2      the Court GRANTS Defendant's Motion to Dismiss with respect to Plaintiffs Second Cause of  
 3      Action for breach of the Guaranteed Contract.

4      4. Breach of Contract – Release

5                Plaintiffs also fail to state a claim for which relief can be granted on their claim for  
 6      breach of the Release Agreements. Here, Plaintiffs allege that "Defendants had an obligation  
 7      under [the Release Agreements] to not interfere with the Plaintiffs' CMV credit or with the  
 8      Plaintiffs' right relative to their common stock." Dkt. # 18 ¶ 6.2. However, Plaintiffs do not  
 9      plead any facts to support this allegation other than the fact that "the release specifically states  
 10     that the Plaintiffs were *not* releasing any rights to their share of Pro-Fac's gains from the Event,  
 11     including stock redemption." *Id.* at ¶ 3.78. Such a statement does not plausibly support an  
 12     inference that Defendants owed Plaintiffs a continuing contractual duty *under the Release*  
 13     *Agreements* to refrain from interfering with Plaintiffs' CMV credit or with their rights to their  
 14     common stock. The Court GRANTS Defendant's Motion to Dismiss with respect to Plaintiffs'  
 15     Third Cause of Action for breach of the Release Agreements.

16      5. Breach of Implied Covenant of Good Faith and Fair Dealing

17                There is in every contract an implied covenant of good faith and fair dealing that  
 18      obligates the parties to a contract to cooperate. *Badgett v. Security State Bank*, 116 Wash.2d  
 19     563, 569-570, 807 P.2d 356, 360 (Wash. 1991). The "duty arises only in connection with terms  
 20      agreed to by the parties." *Id.* Plaintiffs allege that, "All contracts between the Defendants and  
 21      the Plaintiffs include an implied covenant of good faith and fair dealing. Pro-Fac materially  
 22      breached those covenants through the actions described above, causing the plaintiffs to suffer  
 23      damages." Dkt. #18 ¶7.2. Plaintiffs fail to specify the contracts, the specific terms under the  
 24      contracts, or which of Defendant's actions allegedly give rise to a breach of covenant of good

1 faith and fair dealing. The court cannot recognize “a free-floating duty of good faith unattached  
 2 to the underlying legal document.” *Badgett*, 116 Wash.2d at 563. Defendant’s Motion to  
 3 Dismiss is GRANTED with respect to Plaintiffs’ Fourth Cause of Action for Breach of the  
 4 Implied Covenant of Good Faith and Fair Dealing.

5       6. Promissory Estoppel

6           When Plaintiffs learned of Pro-Fac’s decision to sell its pickle business, Pro-Fac  
 7 purportedly “promised the growers that the sale came with significant benefits for the growers.”  
 8 Dkt. #18 ¶ 3.25. In addition, Pro-Fac “represented to the Plaintiffs that the guaranteed contract  
 9 would provide the Plaintiffs the means whereby the Plaintiffs would continue to accumulate  
 10 CMV credit for those ten years.” *Id.* at ¶ 3.31. Both of these promises were made prior to June  
 11 of 2000. *Id.* at ¶ 3.22. Finally, when Plaintiffs signed the Release Agreements in 2008,  
 12 Plaintiffs “reasonably believed that the settlement … would not adversely affect their legal and  
 13 equitable share of Pro-Fac’s gains from the Event” and Pro-Fac “did not suggest otherwise.” *Id.*  
 14 at 3.78-80. Allegedly, Pro-Fac’s duty to perform the promises it made to Plaintiffs about the  
 15 accumulation of CMV credit was breached when Plaintiffs learned in December of 2009 that  
 16 they would not be receiving CMV credit for the years 2008 and 2009.

17           Under Washington’s statute of frauds, a promise is void if not in writing and “by its terms  
 18 is not to be performed in one year from the making thereof.” RCW 19.36.010. Any promises  
 19 made to Plaintiffs in 2000 regarding the effect of the Guaranteed Contract are void because they  
 20 could not be performed until the ten years contemplated in the contract had lapsed. With respect  
 21 to alleged promises that were made in 2008, Plaintiffs have failed to plead with specificity  
 22 regarding what those promises were. The allegation that Plaintiffs “reasonably believed” that the  
 23 settlements would not affect their accumulation of CMV credit is short of an allegation that  
 24 Plaintiffs were affirmatively promised that would be the case. The allegation that Pro-Fac did

1 not “suggest otherwise,” is short of an allegation that Pro-Fac suggested anything at all. To the  
2 extent that Plaintiffs rely on declarations attached to their Opposition to Defendant’s Motion to  
3 Dismiss to allege affirmative statements made by Pro-Fac representatives, those statements are  
4 not properly before the Court on this Motion to Dismiss because Plaintiffs did not refer to the  
5 declarations or allege the facts stated therein in their complaint. *See Ritchie*, 342 F.3d at 908.  
6 Defendant’s Motion to Dismiss is GRANTED with respect to Plaintiffs’ Fifth Cause of Action  
7 for Promissory Estoppel.

8     7. Negligence and Breach of Fiduciary Duty

9         To assert a claim for negligence or breach of fiduciary duty, Plaintiffs must allege that  
10 Pro-Fac owed Plaintiffs a duty distinct from the duties owed to them under their contractual  
11 agreements. *See Am. Nursery Prods.*, 115 Wn.2d at 230. Pro-Fac argues that Plaintiffs’  
12 allegations pertain solely to purported duties owed by Pro-Fac to the Plaintiffs under contract.  
13 Plaintiffs aver that Pro-Fac owes Plaintiffs additional, non-contractual duties, by virtue of their  
14 status as a cooperative corporation. *See* Dkt. #42 (“Whether those duties are properly designated  
15 as ‘fiduciary duties’ or simply additional ‘duties’ in general, they are certainly something more  
16 than mere contractual obligations.”). *See also* Dkt. #18 ¶¶ 3.3 – 3.4 (“At the core of economic  
17 cooperative theory are the following three guiding principles of a cooperative corporation ... (3)  
18 the vesting in and allocation among the members of all fruits and increases arising from their  
19 cooperative endeavor. This lawsuit arises from the failure of Pro-Fac and its Board to properly  
20 comply with the third of these cooperative legal principles.”). To the extent that the duty giving  
21 rise to Plaintiffs’ claim for negligence is fiduciary in nature, Plaintiffs’ negligence claim is  
22 duplicative of that for breach of fiduciary duties. The Court therefore considers both causes of  
23 action in conjunction.

1       Defendant's argument that Pro-Fac, as a corporation, does not owe a duty to its members  
 2 does not necessarily defeat Plaintiffs' claims. Plaintiffs argue that a cooperative corporation  
 3 assumes duties to its members that a for-profit corporation would not otherwise owe to its  
 4 shareholders. At least one court tentatively agrees with Plaintiffs, holding that cooperative  
 5 corporations may owe something greater to its members than for-profit corporations. *See*  
 6 *Peoples Elec. Co-op. v. Western Farmers Elec. Co-op.*, 2010 WL 3895765 at \*2 -3 (W.D.  
 7 Okla. Sep. 29 2010) (rejecting the idea that a cooperative corporation would owe no fiduciary  
 8 duty to members under any circumstances but holding that no such duty existed where member  
 9 was a cooperative corporation itself). It appears that Washington courts have not yet considered  
 10 the issue. If the Washington Supreme Court were to consider the issue, it would "weigh  
 11 considerations of logic, common sense, justice, policy, and precedent." *Affiliated FM Ins. Co. v.*  
 12 *LTK Consulting Sers., Inc.*, 2010 WL 4350338 at \*3 (Wash. Nov. 4 2010).

13       Assuming without deciding that a cooperative corporation owes a fiduciary duty or other  
 14 duty of care to its members, the Plaintiffs have pled the necessary elements of a claim for  
 15 negligence or breach of fiduciary duty. Pro-Fac's Motion to Dismiss with respect to Plaintiffs'  
 16 Sixth Cause and Tenth Cause of Action is accordingly DENIED.

17       8. Negligent Misrepresentation

18       Plaintiffs fail to state a claim for negligent misrepresentation. Under Washington law,  
 19 "One who, in the course of his business, profession or employment, or in any other transaction in  
 20 which he has a pecuniary interest, supplies false information for the guidance of others in their  
 21 business transactions, is subject to liability for pecuniary loss caused to them by their justifiable  
 22 reliance upon the information, *if he fails to exercise reasonable care or competence in obtaining*  
 23 *or communicating the information.*" *Hines v. Data Line Systems, Inc.*, 114 Wash.2d 127, 150,

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1 787 P.2d 8, 21 (Wash. 1990) (emphasis added). Plaintiffs have failed to allege that Pro-Fac  
 2 failed to exercise reasonable care in communicating information to Plaintiffs.

3 Plaintiffs describe two statements that they allege give rise to their claim for negligent  
 4 misrepresentation: (1) Pro-Fac's representation that Plaintiffs would get 10 years of deliveries to  
 5 Dean if they did not oppose the sale of Pro-Fac's cucumber facility, and (2) Pro-Fac's claim that  
 6 signing the release would not diminish or dilute Plaintiffs' share of Pro-Fac's profits. The first  
 7 representation cannot give rise to a claim for negligent misrepresentation because Plaintiffs have  
 8 alleged no facts to support a conclusion that Pro-Fac failed to exercise reasonable care in making  
 9 such a statement. Pro-Fac negotiated a contract with Dean that in fact promised ten years worth  
 10 of cucumber deliveries. Pro-Fac's inability to foresee that Dean's successor would want to  
 11 renege on the contract is by no means a failure to exercise care or competence and Plaintiffs have  
 12 alleged no facts to suggest that Pro-Fac would have known about the request for termination in  
 13 advance.

14 As to Pro-Fac's statement that the release would not diminish Plaintiffs' share of Pro-Fac  
 15 profits, Plaintiffs have failed to allege that Pro-Fac even made such a claim. Plaintiffs'  
 16 complaint states that Plaintiffs "believed that the settlement ... would not adversely affect their  
 17 legal and equitable share of Pro-Fac's gains from the Event." Dkt. #18 ¶ 3.79. However,  
 18 nowhere in the complaint does it state that Pro-Fac made any representations to justify that  
 19 belief. Failing to inform Plaintiffs one way or another does not constitute "false information,"  
 20 and therefore does not meet the criteria for a claim for negligent misrepresentation under  
 21 Washington law. *See Hines*, 114 Wash.2d at 150. The Court GRANTS Pro-Fac's Motion to  
 22 Dismiss with respect to Plaintiffs' Seventh Cause of Action for negligent misrepresentation.

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1       9. Conversion

2              Plaintiffs fail to state a claim for conversion. The tort of conversion is “the act of  
 3 willfully interfering with any chattel, without lawful justification, whereby any person entitled  
 4 thereto is deprived of the possession of it.” *Consulting Overseas Management, Ltd. v. Shtikel*,  
 5 105 Wn. App. 80, 83, 18 P.3d 1144, 1147 (2001). Money may become the subject of  
 6 conversion, but only if the party charged with conversion wrongfully received the money, or if  
 7 that party had an obligation to return the specific money to the party claiming it. *See Westview*  
 8 *Invs., Ltd. V. U.S. Bank*, 133 Wn. App. 195, 202 (1985). Finally, “there is nothing in the nature  
 9 of money making it an improper subject of [conversion] so long as it is capable of being  
 10 identified, as when delivered at one time, by one act and in one mass, or when the deposit is  
 11 special and the identical money is to be kept for the party making the deposit, or when wrongful  
 12 possession of such property is obtained.” *Id.*

13              Plaintiffs argue that Defendants converted their property by (1) denying Plaintiffs the  
 14 ability to receive money from Bay Valley by negotiating a buy-out of the Guaranteed contract,  
 15 (2) buying Plaintiffs’ stock after the buy-out, rather than paying plaintiffs pure contract damages,  
 16 and (3) failing to give Plaintiffs their proper share of proceeds from the sale of the subsidiary and  
 17 planned liquidation. Dkt. #42 p. 23. These allegations, however, do not amount to a plausible  
 18 claim that Pro-Fac wrongfully received money from the Plaintiffs or that it had an obligation to  
 19 “return” it to Plaintiffs. Plaintiffs do not allege a specific act whereby one mass of Plaintiffs’  
 20 money was delivered to Pro-Fac that Plaintiffs are now entitled to receive back from Pro-Fac.  
 21 Nor do they allege that Plaintiffs, rather than Pro-Fac, own the money and stocks at issue. *Cf.*  
 22 *Consulting Overseas Management, Ltd.*, 105 Wn. App. at 86 (holding that a corporation owned  
 23 disputed funds after signing loan documents, and because it owned them, its shareholders did not  
 24 commit conversion when they failed to apply them as specified by the loan agreement). The

1 Court hereby GRANTS Defendant's Motion to Dismiss with respect to Plaintiffs' Eighth Cause  
2 of Action for Conversion.

3 **10. Tortious Interference**

4 Plaintiffs do not address and therefore concede that dismissal is proper as to any claim for  
5 tortious interference with contracts. With respect to tortious interference with business  
6 expectancies, Plaintiffs allege that Pro-Fac interfered with Plaintiffs' business expectancy with  
7 Bay Valley by working with Bay Valley without Plaintiffs' knowledge to buy out the Guaranteed  
8 Contract. Dkt. #18 ¶ 3.63. In a tortious interference claim, a claimant is required to show a  
9 "relationship between parties contemplating a contract, with at least a reasonable expectancy of  
10 fruition." *Scymanski v. Dufault*, 80 Wash.2d 77, 84-85, 491 P.2d 1050 (1971). Plaintiffs were  
11 not parties to the Guaranteed Contract. *See* § III (C)(3), *supra*. Plaintiffs do not allege that they  
12 were contemplating a separate contract with Bay Valley. Therefore, Plaintiffs have failed to  
13 plead the elements of a tortious interference claim. Defendant's Motion to Dismiss with respect  
14 to Plaintiffs' Ninth Cause of Action for tortious interference is GRANTED.

15 **11. Declaratory Judgment/Injunction**

16 Plaintiffs do not address and therefore concede that dismissal is proper as to their  
17 Eleventh Cause of Action for Injunctive Relief. *See* Dkt. #36 23-24. Defendant has not moved  
18 to dismiss Plaintiffs' claim for declaratory relief pursuant to RCW 7.24.030. *Id.* The Court  
19 hereby GRANTS in part and DENIES in part Defendant's Motion to Dismiss with respect to  
20 Plaintiffs' Eleventh Cause of Action. Plaintiffs have failed state a claim for injunctive relief  
21 upon which relief can be granted. Plaintiffs claim for declaratory relief may go forward.

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#### **IV. CONCLUSION**

Having reviewed the relevant pleadings, the declarations and exhibits attached thereto, and the remainder of the record, the Court hereby finds and ORDERS:

- (1) Defendant's Motions to Dismiss (Dkt. #36) is GRANTED in part and DENIED in part, as set out above.
  - (2) The Clerk is directed to forward a copy of this Order to plaintiffs and to all counsel of record.

Dated December 14, 2010.

  
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**RICARDO S. MARTINEZ**  
**UNITED STATES DISTRICT JUDGE**